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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1050

CARLETON D. BEH, *Petitioner*

v.

CITY OF WEST DES MOINES, IOWA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

RESPONDENT'S BRIEF IN OPPOSITION

JACK R. HALL,
1020 Savings and Loan Building,
Des Moines, Iowa 50309,
Counsel for Respondent.

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Comes now the defendant, City of West Des Moines, Iowa, and prays that the plaintiff's petition for a writ of certiorari filed herein be denied for the following reasons.

1. *Judgment rests on an adequate non-federal basis.* (U. S. Supreme Court Rule 16 (1) (b)). First, this respondent points out to the Court that the Supreme Court of Iowa decided this case on an adequate non-federal basis. Note the following language from the opinion of the Iowa Supreme Court at pages 492 and 493 of 131 NW 2d or at page 24 of the plaintiff's petition for writ of certiorari:

> ". . . However, jurisdiction may also rest on a voluntary appearance, Baker v. Baker, 248 Iowa 361, 364, 81 NW 2d 1, 64 A.L.R. 2d 1421, and when so obtained defects in or lack of notice become immaterial.

> "Plaintiff appellant has observed that there are no other appeals on this constitutional question and that as the statute has now been amended the issue will not likely recur. Such being the situation it is only necessary for us to hold that plaintiff's constitutional rights have not been violated by lack of due process of law. We need not pass on the constitutionality of the statute before amendment."

Thus, the Iowa court not only did not pass upon the constitutionality of the statute before amendment, but decided the question raised by the plaintiff on an adequate non-federal basis—that of voluntary appearance of the plaintiff before the city council.

2. *Distinguishing the case of Wuchter* v. *Pizzutti*, 276 U.S. 13, 48 S. Ct. 259, 72 L. Ed. 446 (1928). The important distinguishing fact of this case from the case at bar is found at page 24 of 276 U.S., or at page 10 of the plaintiff's petition for writ of certiorari:

> "But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. *He did not, however, appear in the cause* and such notice was not required by the statute." (italics supplied)

Wuchter did not appear in the proceedings in the lower court. He did not submit himself to that court's jurisdiction. He appealed to the United States from the final judgment. In the case at bar, the petitioner voluntarily appeared before both the city council and the lower courts.

3. *Distinguishing the case of Ridenour* v. *County of Bay*, 366 Mich. 225, 114 N.W. 2d 172 (1962). The Iowa Supreme Court distinguishes this case from the case at bar at page

492 of 114 NW 2d, or at page 23 of the plantiff's petition for writ of certiorari:

> "In the case before us there is an additional element not found in the Ridenour case, i.e. response of the property owner to the notice and the filing of objections with the assessing board or council and ruling thereon."

In addition, the manner of attack in these cases is completely different. In the Ridenour case, the plaintiff attacked the proceedings by a complaint in chancery seeking injunctive relief prior to construction of the public improvement, rather than appealing to the courts pursuant to the special assessment statutes. In the case at bar, the plaintiff did not seek to prevent what he alleges is a violation of his constitutional rights by seeking injunctive relief prior to or after construction of the public improvement, but rather he appealed to and appeared before the city council and the lower courts pursuant to the very Chapter of the Iowa Code he asked the court to declare unconstitutional.

4. *Distinguishing the cases of Meadowbrook Manor Inc.* v. *City of St. Louis Park, Minn.*, 104 NW 2d 540 (1960); and *Wisconsin Electric Power Co.* v. *City of Milwaukee*, 352 U.S. 948, 958, 77 S. Ct. 324, 351; (See subsequent Wisconsin Supreme Court decision at 81 NW 2d 298, 299). Both of these cases are readily distinguishable in that the property owners in each case did not have actual notice or knowledge of the special improvements. In the case at bar the property owner had both notice and knowledge, and in fact appeared before the city council as pointed out above.

5. *Considering the case of Mullane* v. *Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 S. Ct. 652, 94

L. Ed. 865. There is no conflict between the Mullane case and the case at bar. The Iowa Supreme Court points out at page 491 and again at page 492 of 131 NW 2d, or at page 22 and again at page 23 of plaintiff's petition for writ of certiorari, the following quote from the Mullane case:

> "The fundamental requisite of due process of law is the opportunity to be heard."

In the case at bar, the plaintiff was given an opportunity to be heard and he availed himself of that right.

Conclusion

Accordingly, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACK R. HALL,
1020 Savings and Loan Building,
Des Moines, Iowa 50309,
Counsel for Respondent.